Supreme Court, U.S.
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No. 97-1892

In The Supreme Court of the United States

OCTOBER TERM, 1998

PAUL A. BILZERIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF THE PETITIONER

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September 22, 1998

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REPLY OF THE PETITIONER

The government essentially concedes that the two issues I presented in this case merit review in this Court. The government clearly acknowledges the sharp conflict in the circuits. (A six to four split on whether a complete omission of an element is a structural error; and a four to three split on whether a directed verdict is a structural error). Finally, the government acknowledges the importance of the two issues I presented, noting that it has recently acquiesced in the petition in another case involving an identical issue. (Neder v. United States, No. 97-1985).

The government nonetheless maintains that "this case would not be a suitable one in which to address that conflict" (Opp. 8) for three reasons: (1) because this Court's decision in U.S. v. Gaudin, 515 U.S. 506 (1995), announced a new rule of law, my claim is barred; (2) because this case arises on collateral review, it is an inappropriate vehicle to consider the issues presented; and (3) because the court of appeals in this case "applied a special type of harmless-error analysis...[t]here is no conflict on the question whether that particular type of harmless-error analysis is permissible." (Opp. 7-10). All three of the government's reasons are erroneous.

First, the government apparently misunderstands the second issue I presented. The issue is not whether Gaudin announced a new rule of law because, as the government correctly notes, there is no conflict in the circuits on that issue at this time. The issue presented in my petition is whether a partial directed verdict with respect to an essential element of the offense is a structural error. If this Court were to

determine that a partial directed verdict is a structural error, one of the two exceptions of Teague v. Lane, 489 U.S. 288 (1989), would apply and Gaudin would have to be applied retroactively.

Second, whether this case arises on collateral review or direct review is irrelevant to the two issues I have presented. Several of the cases cited by both the government and me, which reflect the conflict in the circuits on the two issues I presented, were decided on collateral review. See, Waldemer v. U.S., 106 F.3d 729 (7th Cir.1996); Roy v. Gomez, 108 F.3d 242 (9th Cir.1997); U.S. v. Dale, 140 F.3d 1054 (D.C.Cir.1998); also see, Harris v. Warden, Louisiana State Penitentiary, ---F.3d--- 1998 WL 526573 (5th Cir.) *3-5. When this Court determines whether the complete omission of an essential element or a partial directed verdict are structural errors that defy harmless error analysis, its decision will have a significant impact ~~on~~ all criminal appeals, whether brought on direct or collateral review.[1]

Third, the government correctly notes that the court of appeals in this case found, and both the government and I agree, that the "underlying facts in the [two] securities fraud counts are identical to the underlying facts in the [five] § 1001 counts." (Pet. App. A-10). The court of appeals in this case then reasoned that because the "underlying facts in the securities fraud

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[1]Of course, whether the presence of a structural error warrants reversal is a separate question that is dependant upon the facts of the particular appeal. For example, even on direct review a structural error may not warrant reversal of a conviction if the error was not preserved at trial. See Johnson v. United States, 117 S.Ct. 1544 (1997).

counts are identical to the underlying facts in the § 1001 counts[,] [n]o rational juror could conclude, on the one hand, that the misrepresentations were material for two counts, but, on the other, those same representations were not material for other counts." (Pet. App. A-10). However, the facts in the securities fraud counts are the *very same facts* that the trial court instructed the jury were material facts "as a matter of law" for the second prong of the § 1001 counts. (Pet. 2). Contrary to the government's suggestion, the first issue presented in this case - whether the complete omission of an essential element of the offense is a structural error - is identical to the issue presented in the Neder case.

Again, contrary to the government's claim, this case will turn on this Court's determination of whether the complete omission of an essential element or a partial directed verdict are structural errors that defy harmless error analysis. The jury in this case never determined, *by itself*, all of the essential elements of the offense for a single count of conviction.

This case is well positioned to enable this Court to address two important issues of criminal law which have severely divided the circuits.[2] No relevant facts are in dispute. There are no procedural hurdles to prevent this Court from addressing the issues

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[2]Despite the several pages of alleged sinister facts recited by the government (Opp. 2-5), no person, or company, has ever claimed to have been harmed by my actions and I have served the full extent of the punishment imposed by the trial court. See Payback, pp. 96-97, Fishel, Daniel, (New York: HarperCollins Publishers, 1995).

presented[3]. The issues were thoroughly contested at every stage of the prior proceedings and were directly confronted by the courts below.[4]

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Paul A. Bilzerian
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[3]Although the government states that I failed to raise the issues presented in my petition on direct appeal, the reference cited by the government for this incorrect statement - Gov't C.A. Br. 22 - is actually a footnote in the government's answer brief that acknowledges that the issues were not waived on direct appeal. In fact, I objected timely at trial; I raised the issues on direct appeal before the Second Circuit and before this Court. (Pet. C.A. Br. pp. 6-7, 11-12).

[4]The Neder case presents a host of significant issues, one of which is identical to one of the two issues presented in this case - whether the complete omission of an element of the offense is a structural error that defies harmless error analysis. However, in the Neder case, the materiality element of the tax offenses that was omitted from the jury's consideration was not contested at trial. In fact, the only defense Neder presented to failing to report nearly $6 million in income was reliance on advice from his attorney and his accountant, which related solely to the issue of intent and not materiality.